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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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EXAMINER

MADSEN, ROBERT A

ART UNIT	PAPER NUMBER
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1761

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DATE MAILED: 05/09/2002

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

09/781,583

Applicant(s)

LLOYD ET AL.

Examiner

Robert Madsen

Art Unit

1761

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☐ Responsive to communication(s) filed on ____.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-45 is/are pending in the application.
- 4a) Of the above claim(s) 25-31 is/are withdrawn from consideration.
- 5) ☐ Claim(s) ____ is/are allowed.
- 6) ☒ Claim(s) 1-24 and 32-45 is/are rejected.
- 7) ☐ Claim(s) ____ is/are objected to.
- 8) ☐ Claim(s) ____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on ____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on ____ is: a) ☐ approved b) ☐ disapproved by the Examiner.
- If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. §§ 119 and 120

- 13) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. ____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).
- a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☒ Information Disclosure Statement(s) (PTO-1449) Paper No(s) 4.
- 4) ☐ Interview Summary (PTO-413) Paper No(s). ____.
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: _____

DETAILED ACTION

Election/Restrictions

Restriction to one of the following inventions is required under 35 U.S.C. 121:

- I. Claims 1-24, 32-45 drawn to a two compartment container filled with dry consumable product and liquid consumable product and the method of making the container, classified in class 426, subclass 115.
- II. Claim 25-31, drawn to cereal and the method of making cereal, classified in class 426, subclass 620.

The inventions are distinct, each from the other because:

Inventions I and II are related as combination and subcombination. Inventions in this relationship are distinct if it can be shown that (1) the combination as claimed does not require the particulars of the subcombination as claimed for patentability, and (2) that the subcombination has utility by itself or in other combinations (MPEP § 806.05(c)). In the instant case, the combination as claimed does not require the particulars of the subcombination as claimed because the dry consumable product does not require the specific combination of physical properties as the cereal. The subcombination has separate utility such as being packaged in a materially different container (e.g. one which is not connected to a liquid compartment).

Because these inventions are distinct for the reasons given above and have acquired a separate status in the art because of their recognized divergent subject matter, restriction for examination purposes as indicated is proper.

During a telephone conversation with Michael Maier on April 9, 2002 a provisional election was made without traverse to prosecute the invention of group I, claims 1-24, 32-45. Affirmation of this election must be made by applicant in replying to this Office action. Claims 25-31 are withdrawn from further consideration by the examiner, 37 CFR 1.142(b), as being drawn to a non-elected invention.

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 21 and 24 are rejected under 35 U.S.C. 102(b) as being clearly anticipated by Dickerson (US 5706980).

Regarding claim 21, See Figures, especially items 20, 22, and 42 , which are uniformly shaped, or all spherical shaped, (Column 5, line 34- Column 6, line 15, Column 8, lines 55-67, Column 10, lines 34-40.)

Regarding claim 24, see Figure 1.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and

Art Unit: 1761

the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1-20 are rejected under 35 U.S.C. 103(a) as being unpatentable over Newarski (US 5727679) in view of Christianson (US 3686001) and Von Fulger (US 4759942).

Regarding claims 1-20, Newarski teaches a first compartment holding milk connected to a second compartment holding R-T-E cereals, including puffed cereals as recited in claims 5,6, 13 and 20, wherein the milk and cereal are contained separately (Abstract, Column 1, lines 50-66, Column 4, lines 43-50). Each compartment has openings with restricted flow (e.g. items 16 and 58 provide restricted flow for the cereal when not fully removed and items 25 and 26 provide restricted flow for the milk in Figures 1 and 2), as recited in claims 1, 7, and 14. Although Newarski teaches a variety of R-T-E cereals such as flakes and puffs, Newarski is silent in teaching any particular density as recited in claims 1,4,11,12,14,15 a diameter as recited in claims 1-3,7-9,16-18, or a particular shape as recited in claims 10 and 19.

Christianson is relied on as evidence of the conventional puffed R-T-E having (1) a density between 5 cu-in/oz and 35 cu-in /oz, or 567 g/cu-in and 81 g/cu-in, (2) a uniform shape, including a spherical shape as recited in claims 10 and 19 (e.g. Cocoa Puffs® in Example 1), and (3) a diameter of about 0.25 in, which is not greater than 0.4, falls with the range of 0.2-0.4, and including a maximum dimension of 0.2-0.25 in as recited in claims 1-3,7-9,16-18(Column 1, lines 20-60, Column 2, lines 62-69, Column 3, lines 50-58, column 4, lines 40-55, Examples).

Von Fulger is relied on as further evidence of the conventional densities found in commercially available puffed R-T-E's that are substantially spherical cereals as recited in claims 10 and 19, such as Trix®, being in the preferred range of 279-492 g/100 cu-in (i.e. 0.17 g/cc to 0.3 g/cc) as recited in claims 1, 4, 11, 12, 14, 15. Von Fulger teaches this is a desirable density range for R-T-E since Von Fulger teaches a method for obtaining this range of densities for high bran products, which do not normally have densities in this range (Abstract, Column 6, lines 3-10, Column 8, lines 5-9).

Therefore, it would have been obvious to select a puffed R-T-E having a density not less than 225 g/100 cu-in, as recited in claims 1, 4, 11, 12, 14, 15, since Newarski teaches puffed cereals and it was well known in the art that commercially available puffed cereals conventionally have densities greater than 225 g/100 cu-in because this is a density range preferred by consumers and one would have been substituting one conventional puffed cereal for another. Furthermore, it would have been obvious to select to select a substantially spherical puffed cereal, as recited in claims 10 and 19, since commercially available spherical puffed cereal having the consumer preferred density was well known (e.g. Trix®). Furthermore, it would have been obvious to select a cereal with a diameter of 0.2-0.4 inches since conventional puffed spherical R-T-E's having a diameter of about 0.25 in. are notoriously well known, and a diameter about 0.25 is not greater than 0.4 in. falls within the range of 0.2-0.4 in., and including a maximum dimension of 0.2-0.25 in. as recited in claims 1-3, 7-9, 16-18.

Art Unit: 1761

Claims 22 and 23 are rejected under 35 U.S.C. 103(a) as being unpatentable over Dickerson (US 5706980) as applied to claim 21 above, further in view of Christianson (US 3686001) , Von Fulger (US 4759942), and Newarski (US 5727679).

Dickerson teaches spherical cereal, but is silent in teaching a particular diameter or density as recited in claim 22 or that the cereal is puffed as recited in claim 23.

Christianson is relied on as evidence of the conventional commercial spherical cereals (such as Cocoa Puffs ® in Example 1) that are puffed R-T-E's having (1) a density between 5 cu-in/oz and 35 cu-in /oz, or 567 g/cu-in and 81 g/cu-in, and a diameter of about 0.25 in, which falls with the range of 0.2-0.4 (Column 1, lines 20-60, Column 2, lines 62-69, Column 3, lines 50-58, column 4, lines 40-55, Examples).

Von Fulger is relied on as further evidence of the conventional densities found in commercially available spherical puffed R-T-E's (such as Trix ®) are preferably in range of 279-492 g/100 cu-in (i.e. 0.17 g/cc to 0.3 g/cc). Von Fulger teaches this is a desirable density range for R-T-E since Von Fulger teaches a method for obtaining this range of densities for high bran products , which do not normally have densities in this range (Abstract, Column 6, lines 3-10, Column 8, lines 5-9).

Newarski is relied on as further evidence of the conventionality of packaging milk and puffed R-T-E's in connected containers (Abstract, Column 1, lines 50-66, Column 4, lines 43-50).

Therefore, once it was known to use spherical cereal, selecting any commercially available spherical cereal having the recited dimension or density, would have been obvious because it was well known that the commercially available puffed spherical R-

Art Unit: 1761

T-E's have a consumer preferred density between 225-375 g/100 cu-in and it was well known to package puffed R-T-Es with milk in connected containers. Furthermore, it was also well known that these spherical puffed R-T-E's have a diameter of 0.2-0.4 inches. One would merely be substituting one conventional spherically shaped R-T-E for another.

Claims 32-34,36-38 are rejected under 35 U.S.C. 103(a) as being unpatentable over Dickerson (US 5706980) in view of Christianson (US 3686001).

Regarding claims 32-34,36-38, Dickerson teaches providing first compartment and a second compartment with a pour openings, dispensing a milk into the first, and R-T-E cereal, which is uniformly spherically (See Figures) as recited in claims 36 and 37, into the second as recited in claim 38. Dickerson teaches the containers are connected and separately contain the milk and cereal. (Abstract, Column 10 lines 3-15, Column 7, lines 17-40). Dickerson is silent in teaching the cereal has a particular diameter as recited in claims 32-34.

However, commercially available spherical R-T-E's are well known in the art and are well known to have having diameters of 0.2-0.4 in. For example, Christianson is relied on as evidence of the conventional commercial spherical R-T-E's (Cocoa Puffs® in Example 1) having a diameter of about 0.25 in, which falls with the range of 0.2-0.4 (Column 1, lines 20-60, Column 2, lines 62-69, Column 3, lines 50-58, column 4, lines 40-55, Examples). Therefore, because Dickerson teaches the consumer fills the second compartment with an R-T-E cereal, it would have been obvious to select a commercially

available spherical R-T-E cereal having a diameter of 0.2-0.4 in, since commercial available spherical R-T-E cereals with this diameter are notoriously well known. One would have been substituting one conventional spherical R-T-E for another.

Claim 35 is rejected under 35 U.S.C. 103(a) as being unpatentable over Dickerson (US 5706980) in view of Christianson (US 3686001) as applied to claim 32 above further in view of Von Fulger (US 4759942)

Dickerson is silent in teaching the density of the spherical R-T-E's. Christianson is relied on as evidence of the conventional spherical R-T-E ,which is puffed, being between 5 cu-in/oz and 35 cu-in /oz, or 567 g/cu-in and 81 g/cu-in (Column 1, lines 20-60, Column 2, lines 62-69, Column 3, lines 50-58, column 4, lines 40-55, Examples).

Von Fulger is not only relied on as further evidence of a conventionality of spherical R-T-E's , but is relied on as evidence of the conventionality of the density of a conventional spherical R-T-E being between 225 and 375 g/cu-in (e.g.. 279 g/ 100 cu-in for Trix®) as well as the preferred range of densities for puffed R-T-E's in general being in range of 279-492 g/100 cu-in (i.e. 0.17 g/cc to 0.3 g/cc). Von Fulger teaches this is a desirable density range for R-T-E since Von Fulger teaches a method for obtaining this range of densities for high bran products , which do not normally have densities in this range (Abstract, Column 6, lines 3-10, Column 8, lines 5-9).

Therefore, once it was known to use spherical R-T-E's for the consumer-filled container of Dickerson, it would have been obvious to select a commercially available spherical R-T-E cereals with a density between 225-375 g/100 cu-in, since this is a

consumer preferred density range. One would have been merely substituting one spherical R-T-E available to a consumer for another.

Claims 39,40,43-45 are rejected under 35 U.S.C. 103(a) as being unpatentable over Newarski (US 5727679) in view of Von Fulger (US 4759942).

Newarski teaches providing a container with a first compartment that is filled with milk connected to a second compartment that is filled with R-T-E cereals, including puffed cereals wherein the milk and cereal are contained separately as recited in claim 45. Each compartment has openings with restricted flow (e.g. items 16 and 58 provide restricted flow for the cereal when not fully removed and items 25 and 26 provide restricted flow for the milk in Figures 1 and 2) as recited in claim 39. The container is pre-packaged for the consumer (Abstract, Column 1, lines 50-66, Column 3, line 14 to Column 4, line 50). Newarski is silent in teaching the cereal has a particular density as recited in claims 39 and 40 or a particular shape as recited in claims 43 and 44.

Von Fulger is relied on as further evidence of the conventional densities found in commercially available puffed R-T-E's are preferably in range of 279-492 g/100 cu-in (i.e. 0.17 g/cc to 0.3 g/cc), as recited in claims 39 and 40. Von Fulger teaches this is a desirable density range for R-T-E since Von Fulger teaches a method for obtaining this range of densities for high bran products, which do not normally have densities in this range. Von Fulger also teaches an example of such a puffed R-T-E is Trix®, which is known to be spherically shaped as recited in claims 43 and 44 (Abstract, Column 6, lines 3-10, Column 8, lines 5-9).

Art Unit: 1761

Therefore, it would have been obvious to substitute the puffed R-T-E of Newarski with a puffed R-T-E having a density of 225-375 g/100 cu-in since this is a desirable density for puffed R-T-E's and one would have been substituting one known puffed cereal for another for the same purpose: packaging in a container for a consumer.

Claims 41 and 42, are rejected under 35 U.S.C. 103(a) as being unpatentable over Newarski (US 5727679) in view of Von Fulger (US 4759942), as applied to claim 39 above, further in view of Christianson (US 3686001).

Regarding claims 41 and 42, Newarski is silent in teaching any particular diameter of the puffed R-T-E. Christianson, however, is relied on as evidence of the conventional commercial spherical R-T-E's (Cocoa Puffs ® in Example 1) that has a density that may fall within the range of 225-375 g/100 cu-in (i.e. 5 cu-in/oz -35 cu-in /oz , or between 567 g/100cu-in and 81 g/100cu-in), but has a diameter of *about* 0.25 in, which falls with the range of 0.2-0.4 (Column 1, lines 20-60, Column 2, lines 62-69, Column 3, lines 50-58, column 4, lines 40-55, Examples). Therefore, once it was known to use puffed R-T-E's, it would have been obvious to select a diameter of about 0.25 in , or within the range of 0.2 to 0.4 in., since one would have been substituting one commercially available puffed R-T-E for another for the same purpose: packaging in a container for a consumer.

Double Patenting

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11

Art Unit: 1761

F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and, *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claims 1-20 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claim 1-21 of copending Application No. 09/781,581 in view of Newarski (US 5727679), Christianson (US 3686001), and Von Fulger (US 4759942).

Regarding claims 1-20, Application '581 claims a first compartment holding milk connected to a second compartment holding cereal wherein the milk and cereal are contained separately. Each compartment has openings with restricted flow, as recited in claims 1, 7, and 14. Thus '581 claims all the structural limitations of the container as recited in claims 1-20. However, although '581 claims cereals, '581 does not claim R-T-E's per se, as recited in claim 5, a puffed cereal as recited in claims 6, 13, and 20, particular density as recited in claims 1, 4, 11, 12, 14, 15, a diameter as recited in claims 1-3, 7-9, 16-18, or a particular shape as recited in claims 10 and 19.

Newarski is relied on as evidence of the conventionality of a container comprising connected compartments of milk and cereals that are R-T-E's as recited in claim 5 and puffed (Abstract, Column 1, lines 50-66, Column 3, line 14 to Column 4, line 50).

Christianson is relied on as evidence of the conventional puffed R-T-E having (1) a density between 5 cu-in/oz and 35 cu-in /oz, or 567 g/cu-in and 81 g/cu-in, (2) a uniform shape, including a spherical shape as recited in claims 10 and 19 (including Cocoa Puffs ® in Example 1), and (3) a diameter of about 0.25 in, which is not greater than 0.4, falls with the range of 0.2-0.4, and including a maximum dimension of 0.2-0.25 in as recited in claims 1-3,7-9,16-18(Column 1, lines 20-60, Column 2, lines 62-69, Column 3, lines 50-58, column 4, lines 40-55, Examples).

Von Fulger is relied on as further evidence of the conventional densities found in commercially available puffed R-T-E's that are substantially spherical cereals as recited in claims 10 and 19, such as Trix ®, being in the preferred range of 279-492 g/100 cu-in (i.e. 0.17 g/cc to 0.3 g/cc) as recited in claims1,4,11,12,14,15. Von Fulger teaches this is a desirable density range for R-T-E since Von Fulger teaches a method for obtaining this range of densities for high bran products , which do not normally have densities in this range (Abstract, Column 6, lines 3-10, Column 8, lines 5-9).

Therefore, it would have been obvious to select a puffed R-T-E having a density not less than 225 g/100 cu-in, as recited in claims1,4,11,12,14,15, since Newarski teaches puffed cereals and milk packaged in the same container and it was well known in the art that commercially available puffed cereals having densities greater than 225 g/100 cu-in are preferred by consumers and one would have been substituting one conventional puffed cereal for another. Furthermore, to select any conventional, commercially available puffed cereal with a particular shape, as recited in claims 10 and 19, would have been obvious since substantially spherical puffed cereals having the

consumer preferred density are notoriously well known (e.g. Trix®). Furthermore, it would have been obvious to select a cereal with a diameter of 0.2-0.4 inches since conventional puffed spherical R-T-E's having a diameter of about 0.25 in. are notoriously well known, and a diameter about 0.25 is not greater than 0.4 in. falls within the range of 0.2-0.4 in., and including a maximum dimension of 0.2-0.25 in. as recited in claims 1-3,7-9,16-18.

This is a provisional obviousness-type double patenting rejection.

Claims 21 and 24 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claim 1-21 of copending Application No. 09/781,581 in view of Dickerson (US 5706980).

Application '581 claims a first compartment holding milk connected to a second compartment holding cereal wherein the milk and cereal are contained separately and each compartment has openings with restricted flow. However, although '581 claims cereals, '581 does not claim any particular size, shape or density of cereal.

Dickerson also teaches a first compartment holding milk connected to a second compartment holding cereal wherein the milk and cereal are contained separately and each compartment has openings with restricted flow. Furthermore, Dickerson is relied on as evidence of the conventionality of the cereal being uniformly shaped, or all spherical shaped, and wherein the pour opening is sized at least 2.5 times greater than the maximum cross sectional area of each cereal piece (See Figures, Column 5, line 34- Column 6, line 15, Column 8, lines 55-67, Column 10, lines 34-40.)

Therefore, it would have been obvious to modify '581 and include uniformly shaped cereal since one would have been substituting one known cereal for another for the same purpose: a container holding milk and cereal in separate compartments. To modify the pour opening of '581 such that the pour opening is sized at least 2.5 times greater than the maximum cross sectional area of each cereal piece, would have been an obvious result effective variable of the intended amount of flow cereal desired since Dickerson teaches the hole controls the flow and adjusts the size accordingly.

This is a provisional obviousness-type double patenting rejection.

Claims 22 and 23 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claim 1-21 of copending Application No. 09/781,581 in view of Dickerson (US 5706980) as applied to claim 21 above, further in view of Christianson (US 3686001), Von Fulger (US 4759942), and Newarski (US 5727679).

'581 does not claim a particular diameter or density as recited in claim 22 or that the cereal is puffed as recited in claim 23.

Christianson is relied on as evidence of the conventional commercial spherical cereals (such as Cocoa Puffs ® in Example 1) that are puffed R-T-E's having (1) a density between 5 cu-in/oz and 35 cu-in /oz, or 567 g/cu-in and 81 g/cu-in, and a diameter of about 0.25 in, which falls with the range of 0.2-0.4 (Column 1, lines 20-60, Column 2, lines 62-69, Column 3, lines 50-58, column 4, lines 40-55, Examples).

Von Fulger is relied on as further evidence of the conventional densities found in commercially available spherical puffed R-T-E's (such as Trix ®) are preferably in range of 279-492 g/100 cu-in (i.e. 0.17 g/cc to 0.3 g/cc). Von Fulger teaches this is a desirable density range for R-T-E since Von Fulger teaches a method for obtaining this range of densities for high bran products, which do not normally have densities in this range (Abstract, Column 6, lines 3-10, Column 8, lines 5-9).

Newarski is relied on as further evidence of the conventionality of packaging milk and puffed R-T-E's in connected containers (Abstract, Column 1, lines 50-66, Column 4, lines 43-50).

Therefore, once it was known to use spherical cereal, selecting any commercially available spherical cereal having the recited dimension or density, would have been obvious because it was well known that the commercially available puffed spherical R-T-E's have a consumer preferred density between 225-375 g/100 cu-in and it was well known to package puffed R-T-Es with milk in connected containers. Furthermore, it was also well known that these spherical puffed R-T-E's have a diameter of 0.2-0.4 inches. One would merely be substituting one conventional spherically shaped R-T-E for another.

This is a provisional obviousness-type double patenting rejection.

Claims 32-34, 36-38 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claim 23-38

Art Unit: 1761

of copending Application No. 09/781,581 in view of Dickerson (US 5706980) and Christianson (US 3686001).

'581 claims providing first compartment and a second compartment with a pour openings, dispensing a milk into the first, and cereal into the second wherein the compartments are connected and separately contain the milk and cereal. '581 is silent in teaching the cereal is an R-T-E per se as recited in claim 38, uniformly spherically as recited in claims 36 and 37, has a particular diameter as recited in claims 32-34

However, Dickerson, who teach method similar to '581, is relied on as evidence of using an R-T-E cereal, which is uniformly spherically (See Figures) as recited in claims 36 and 37 (Abstract, Column 10 lines 3-15, Column 7, lines 17-40).

Christianson is relied on as evidence of the conventional spherical R-T-E's (Cocoa Puffs ® in Example 1) having a diameter of about 0.25 in, which falls with the range of 0.2-0.4 (Column 1, lines 20-60, Column 2, lines 62-69, Column 3, lines 50-58, column 4, lines 40-55, Examples). Therefore, because Dickerson teaches the consumer fills the second compartment with an R-T-E cereal, it would have been obvious to select a commercially available spherical R-T-E cereal having a diameter of 0.2-0.4 in, since commercial available spherical R-T-E cereals with this diameter are notoriously well known. One would have been substituting one conventional spherical R-T-E for another.

This is a provisional obviousness-type double patenting rejection.

Claim 35 is provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claim 23-38 of copending Application No. 09/781,581 in view of Dickerson (US 5706980) and

Art Unit: 1761

Christianson (US 3686001) as applied to claim 32 above, further in view of Von Fulger (US 4759942).

'581 does not claim a particular cereal density.

Christianson is relied on as evidence of the conventional puffed spherical R-T-E of about 0.25 in having a density between 5 cu-in/oz and 35 cu-in /oz, or 567 g/cu-in and 81 g/cu-in (Column 1, lines 20-60, Column 2, lines 62-69, Column 3, lines 50-58, column 4, lines 40-55, Examples).

Von Fulger is not only relied on as further evidence of a conventionality of spherical puffed R-T-E's , but is relied on as evidence of the conventionality of the density of a conventional spherical R-T-E being between 225 and 375 g/cu-in (e.g.. 279 g/ 100 cu-in for Trix ®) as well as the preferred range of densities for puffed R-T-E's in general being in range of 279-492 g/100 cu-in (i.e. 0.17 g/cc to 0.3 g/cc). Von Fulger teaches this is a desirable density range for R-T-E since Von Fulger teaches a method for obtaining this range of densities for high bran products , which do not normally have densities in this range (Abstract, Column 6, lines 3-10, Column 8, lines 5-9).

Therefore once it was known to use spherical R-T-E's for a consumer-filled container, it would have been obvious to select a commercially available spherical R-T-E cereals with a density between 225-375 g/100 cu-in, since this is a consumer preferred density range. One would have been merely substituting one spherical R-T-E available to a consumer for another.

This is a provisional obviousness-type double patenting rejection.

Claims 39,40,43-45 are is provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claim 23-38 of copending Application No. 09/781,581 in view of Newarski (US 5727679) and Von Fulger (US 4759942).

'581 claims providing first compartment and a second compartment with a pour openings, dispensing a milk into the first, and cereal into the second wherein the compartments are connected and separately contain the milk and cereal. However, '581 does not claim a particular density for the cereal as recited in claims 39 and 40, a uniformly spherical cereal as recited in claims 43 and 44, or R-T-E's per se as recited in claim 45.

Newarski, who also teaches a similar method as '581, is relied on as evidence of filling the second compartment that is filled with R-T-E cereals, which are puffed, as recited in claim 45. The container is pre-packaged for the consumer (Abstract, Column 1, lines 50-66, Column 3, line 14 to Column 4, line 50).

Von Fulger is relied on as further evidence of the conventional densities found in commercially available puffed R-T-E's are preferably in range of 279-492 g/100 cu-in (i.e. 0.17 g/cc to 0.3 g/cc), as recited in claims 39 and 40. Von Fulger teaches this is a desirable density range for R-T-E since Von Fulger teaches a method for obtaining this range of densities for high bran products, which do not normally have densities in this range. Von Fulger also teaches an example of such a puffed R-T-E is Trix®, which is known to be spherically shaped as recited in claims 43 and 44 (Abstract, Column 6, lines 3-10, Column 8, lines 5-9).

Therefore, it would have been obvious to substitute the puffed R-T-E of Newarski with a puffed R-T-E having a density of 225-375 g/100 cu-in since this is a desirable density for puffed R-T-E's and one would have been substituting one known puffed cereal for another for the same purpose: packaging in a container for a consumer.

This is a provisional obviousness-type double patenting rejection.

Claims 41 and 42, are is provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claim 23-38 of copending Application No. 09/781,581 in view of Newarski (US 5727679) and Von Fulger (US 4759942) as applied to claim 39 above, further in view of Christianson (US 3686001).

Regarding claims 41 and 42, '581 does not claim any particular diameter of cereal.

Christianson, however, is relied on as evidence of the conventional commercial spherical R-T-E's (Cocoa Puffs ® in Example 1) that has a density that may fall within the range of 225-375 g/100 cu-in (i.e. 5 cu-in/oz -35 cu-in /oz , or between 567 g/100cu-in and 81 g/100cu-in), but has a diameter of *about* 0.25 in, which falls with the range of 0.2-0.4 (Column 1, lines 20-60, Column 2, lines 62-69, Column 3, lines 50-58, column 4, lines 40-55, Examples). Therefore, once it was known to use puffed R-T-E's, it would have been obvious to select a diameter of about 0.25 in , or within the range of 0.2 to 0.4 in., since one would have been substituting one commercially available

puffed R-T-E for another for the same purpose: packaging in a container for a consumer.

This is a provisional obviousness-type double patenting rejection.

Claims 1-20 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 1-37 of copending Application No. 09/781,582 in view of in view of Newarski (US 5727679), Christianson (US 3686001), and Von Fulger (US 4759942).

Application '582 claims a first compartment holding milk connected to a second compartment holding cereal wherein the milk and cereal are contained separately. Each compartment has openings with restricted flow, as recited in claims 1, 7, and 14. Thus '581 claims all the structural limitations of the container as recited in claims 1-20. However, although '581 claims cereals, '581 does not claim R-T-E's per se, as recited in claim 5, a puffed cereal as recited in claims 6,13, and 20, particular density as recited in claims 1,4,11,12,14,15, a diameter as recited in claims 1-3,7-9,16-18, or a particular shape as recited in claims 10 and 19.

Newarski is relied on as evidence of the conventionality of a container comprising connected compartments of milk and cereals that are R-T-E's as recited in claim 5 and puffed (Abstract, Column 1, lines 50-66, Column 3, line 14 to Column 4, line 50).

Christianson is relied on as evidence of the conventional puffed R-T-E having (1) a density between 5 cu-in/oz and 35 cu-in /oz, or 567 g/cu-in and 81 g/cu-in, (2) a uniform shape, including a spherical shape as recited in claims 10 and 19 (including

Art Unit: 1761

Cocoa Puffs ® in Example 1), and (3) a diameter of about 0.25 in, which is not greater than 0.4, falls with the range of 0.2-0.4, and including a maximum dimension of 0.2-0.25 in as recited in claims 1-3,7-9,16-18(Column 1, lines 20-60, Column 2, lines 62-69, Column 3, lines 50-58, column 4, lines 40-55, Examples).

Von Fulger is relied on as further evidence of the conventional densities found in commercially available puffed R-T-E's that are substantially spherical cereals as recited in claims 10 and 19, such as Trix ®, being in the preferred range of 279-492 g/100 cu-in (i.e. 0.17 g/cc to 0.3 g/cc) as recited in claims 1,4,11,12,14,15. Von Fulger teaches this is a desirable density range for R-T-E since Von Fulger teaches a method for obtaining this range of densities for high bran products, which do not normally have densities in this range (Abstract, Column 6, lines 3-10, Column 8, lines 5-9).

Therefore, it would have been obvious to select a puffed R-T-E having a density not less than 225 g/100 cu-in, as recited in claims 1,4,11,12,14,15, since Newarski teaches puffed cereals and milk packaged in the same container and it was well known in the art that commercially available puffed cereals having densities greater than 225 g/100 cu-in are preferred by consumers and one would have been substituting one conventional puffed cereal for another. Furthermore, to select any conventional, commercially available puffed cereal with a particular shape, as recited in claims 10 and 19, would have been obvious since substantially spherical puffed cereals having the consumer preferred density are notoriously well known (e.g. Trix ®). Furthermore, it would have been obvious to select a cereal with a diameter of 0.2-0.4 inches since conventional puffed spherical R-T-E's having a diameter of about 0.25 in. are

Art Unit: 1761

notoriously well known, and a diameter about 0.25 is not greater than 0.4 in. falls with the range of 0.2-0.4 in., and including a maximum dimension of 0.2-0.25 in. as recited in claims 1-3,7-9,16-18.

This is a provisional obviousness-type double patenting rejection.

Claims 21 and 24 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claim 1-37 of copending Application No. 09/781,582 in view of Dickerson (US 5706980).

Application '582 claims a first compartment holding milk connected to a second compartment holding cereal wherein the milk and cereal are contained separately and each compartment has openings with restricted flow. However, although '582 claims cereals, '581 does not claim any particular size, shape or density of cereal.

Dickerson also teaches a first compartment holding milk connected to a second compartment holding cereal wherein the milk and cereal are contained separately and each compartment has openings with restricted flow. Furthermore, Dickerson is relied on as evidence of the conventionality of the cereal being uniformly shaped, or all spherical shaped, and wherein the pour opening is sized at least 2.5 times greater than the maximum cross sectional area of each cereal piece (See Figures, Column 5, line 34- Column 6, line 15, Column 8, lines 55-67, Column 10, lines 34-40.)

Therefore, it would have been obvious to modify '582 and include uniformly shaped cereal since one would have been substituting one known cereal for another for the same purpose: a container holding milk and cereal in separate compartments. To

modify the pour opening of '582 such that the pour opening is sized at least 2.5 times greater than the maximum cross sectional area of each cereal piece, would have been an obvious result effective variable of the intended amount of flow cereal desired since Dickerson teaches the hole controls the flow and adjusts the size accordingly.

This is a provisional obviousness-type double patenting rejection.

Claims 22 and 23 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claim 1-37 of copending Application No. 09/781,582 in view of Dickerson (US 5706980) as applied to claim 21 above, further in view of Christianson (US 3686001), Von Fulger (US 4759942), and Newarski (US 5727679).

'582 does not claim a particular diameter or density as recited in claim 22 or that the cereal is puffed as recited in claim 23.

Christianson is relied on as evidence of the conventional commercial spherical cereals (such as Cocoa Puffs® in Example 1) that are puffed R-T-E's having (1) a density between 5 cu-in/oz and 35 cu-in /oz, or 567 g/cu-in and 81 g/cu-in, and a diameter of about 0.25 in, which falls with the range of 0.2-0.4 (Column 1, lines 20-60, Column 2, lines 62-69, Column 3, lines 50-58, column 4, lines 40-55, Examples).

Von Fulger is relied on as further evidence of the conventional densities found in commercially available spherical puffed R-T-E's (such as Trix®) are preferably in range of 279-492 g/100 cu-in (i.e. 0.17 g/cc to 0.3 g/cc). Von Fulger teaches this is a desirable density range for R-T-E since Von Fulger teaches a method for obtaining this

range of densities for high bran products , which do not normally have densities in this range (Abstract, Column 6, lines 3-10, Column 8, lines 5-9).

Newarski is relied on as further evidence of the conventionality of packaging milk and puffed R-T-E's in connected containers (Abstract, Column 1, lines 50-66, Column 4, lines 43-50).

Therefore, once it was known to use spherical cereal, selecting any commercially available spherical cereal having the recited dimension or density, would have been obvious because it was well known that the commercially available puffed spherical R-T-E's have a consumer preferred density between 225-375 g/100 cu-in and it was well known to package puffed R-T-Es with milk in connected containers. Furthermore, it was also well known that these spherical puffed R-T-E's have a diameter of 0.2-0.4 inches. One would merely be substituting one conventional spherically shaped R-T-E for another.

This is a provisional obviousness-type double patenting rejection.

Claims 32-34, 36-38 are provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claim 38-46 of copending Application No. 09/781,582 in view of Dickerson (US 5706980) and Christianson (US 3686001).

'582 claims providing first compartment and a second compartment with a pour openings, dispensing a milk into the first, and cereal into the second wherein the compartments are connected and separately contain the milk and cereal. '582 is silent

Art Unit: 1761

in teaching the cereal is an R-T-E per se as recited in claim 38, uniformly spherically as recited in claims 36 and 37, has a particular diameter as recited in claims 32-34

However, Dickerson, who teach method similar to '582, is relied on as evidence of using an R-T-E cereal, which is uniformly spherically (See Figures) as recited in claims 36 and 37 (Abstract, Column 10 lines 3-15, Column 7, lines 17-40).

Christianson is relied on as evidence of the conventional spherical R-T-E's (Cocoa Puffs ® in Example 1) having a diameter of about 0.25 in, which falls with the range of 0.2-0.4 (Column 1, lines 20-60, Column 2, lines 62-69, Column 3, lines 50-58, column 4, lines 40-55, Examples). Therefore, because Dickerson teaches the consumer fills the second compartment with an R-T-E cereal, it would have been obvious to select a commercially available spherical R-T-E cereal having a diameter of 0.2-0.4 in, since commercial available spherical R-T-E cereals with this diameter are notoriously well known. One would have been substituting one conventional spherical R-T-E for another.

This is a provisional obviousness-type double patenting rejection.

Claim 35 is provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 38-46 of copending Application No. 09/781,582 in view of Dickerson (US 5706980) and Christianson (US 3686001) as applied to claim 32 above, further in view of Von Fulger (US 4759942).

'582 does not claim a particular cereal density.

Art Unit: 1761

Christianson is relied on as evidence of the conventional puffed spherical R-T-E of about 0.25 in having a density between 5 cu-in/oz and 35 cu-in /oz, or 567 g/cu-in and 81 g/cu-in (Column 1, lines 20-60, Column 2, lines 62-69, Column 3, lines 50-58, column 4, lines 40-55, Examples).

Von Fulger is not only relied on as further evidence of a conventionality of spherical puffed R-T-E's , but is relied on as evidence of the conventionality of the density of a conventional spherical R-T-E being between 225 and 375 g/cu-in (e.g.. 279 g/ 100 cu-in for Trix ®) as well as the preferred range of densities for puffed R-T-E's in general being in range of 279-492 g/100 cu-in (i.e. 0.17 g/cc to 0.3 g/cc). Von Fulger teaches this is a desirable density range for R-T-E since Von Fulger teaches a method for obtaining this range of densities for high bran products , which do not normally have densities in this range (Abstract, Column 6, lines 3-10, Column 8, lines 5-9).

Therefore, Therefore, once it was known to use spherical R-T-E's for the consumer-filled container, it would have been obvious to select a commercially available spherical R-T-E cereals with a density between 225-375 g/100 cu-in, since this is a consumer preferred density range. One would have been merely substituting one spherical R-T-E available to a consumer for another.

This is a provisional obviousness-type double patenting rejection.

Claims 39,40,43-45 are is provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claim 38-46

of copending Application No. 09/781,582 in view of Newarski (US 5727679) and Von Fulger (US 4759942).

'582 claims providing first compartment and a second compartment with a pour openings, dispensing a milk into the first, and cereal into the second wherein the compartments are connected and separately contain the milk and cereal. However, '581 does not claim a particular density for the cereal as recited in claims 39 and 40, a uniformly spherical cereal as recited in claims 43 and 44, or R-T-E's per se as recited in claim 45.

Newarski, who also teaches a similar method as '582, is relied on as evidence of filling the second compartment that is filled with R-T-E cereals, which are puffed, as recited in claim 45. The container is pre-packaged for the consumer (Abstract, Column 1, lines 50-66, Column 3, line 14 to Column 4, line 50).

Von Fulger is relied on as further evidence of the conventional densities found in commercially available puffed R-T-E's are preferably in range of 279-492 g/100 cu-in (i.e. 0.17 g/cc to 0.3 g/cc), as recited in claims 39 and 40. Von Fulger teaches this is a desirable density range for R-T-E since Von Fulger teaches a method for obtaining this range of densities for high bran products, which do not normally have densities in this range. Von Fulger also teaches an example of such a puffed R-T-E is Trix®, which is known to be spherically shaped as recited in claims 43 and 44 (Abstract, Column 6, lines 3-10, Column 8, lines 5-9).

Therefore, it would have been obvious to substitute the puffed R-T-E of Newarski with a puffed R-T-E having a density of 225-375 g/100 cu-in since this is a desirable

Art Unit: 1761

density for puffed R-T-E's and one would have been substituting one known puffed cereal for another for the same purpose: packaging in a container for a consumer.

This is a provisional obviousness-type double patenting rejection.

Claims 41 and 42, are is provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claim 38-46 of copending Application No. 09/781,582 in view of Newarski (US 5727679) and Von Fulger (US 4759942) as applied to claim 39 above, further in view of Christianson (US 3686001).

Regarding claims 41 and 42, '582 does not claim any particular diameter of cereal. Christianson, however, is relied on as evidence of the conventional commercial spherical R-T-E's (Cocoa Puffs ® in Example 1) that has a density that may fall within the range of 225-375 g/100 cu-in (i.e. 5 cu-in/oz -35 cu-in /oz , or between 567 g/100cu-in and 81 g/100cu-in), but has a diameter of *about* 0.25 in, which falls with the range of 0.2-0.4 (Column 1, lines 20-60, Column 2, lines 62-69, Column 3, lines 50-58, column 4, lines 40-55, Examples). Therefore, once it was known to use puffed R-T-E's, it would have been obvious to select a diameter of about 0.25 in , or within the range of 0.2 to 0.4 in., since one would have been substituting one commercially available puffed R-T-E for another for the same purpose: packaging in a container for a consumer.

This is a provisional obviousness-type double patenting rejection.


Conclusion


The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. Foehse et al. (US 5151283) and Creighton et al. (US 5176936) teach conventional puffed RTE properties. Ennis (US 6196406 B1), Thomas et al. (US 6053402), Andrzejczak (US 5981913), Smith (US 2170311), and Davidson et al. (GB 2331976) all teach a milk and cereal compartment connected to one another.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Robert Madsen whose telephone number is (703)305-0068. The examiner can normally be reached on 7:00AM-3:30PM M-F.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on (703)308-3959. The fax phone numbers for the organization where this application or proceeding is assigned are (703)872-9310 for regular communications and (703)872-9311 for After Final communications.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703) 308-0061.


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Robert Madsen 
Examiner
Art Unit 1761
May 6, 2002